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THE GERMAN DOCTRINE OF THE BUDGET

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The evolution of parliamentary government in Germany proceeds apace. The virtual admission of Chancellor Bülow, on the occasion of the publication of the Kaiser's interview with the retired English diplomat in October, 1908, that the government's defeat by the reichstag would necessarily involve his resignation will be at once recalled. This promise has been now actually fulfilled, and that suave and genial statesman's retirement, upon the defeat of his budget, advances Germany one step farther toward a modern system of ministerial responsibility to the people's representatives. The appointment of a successor who promises a continuation of Bülow's policy indicates that there are other important steps yet to be taken, but does not obscure the significance of this change of ministers. Within no distant period it is altogether likely we shall see a full-fledged system of political ministerial responsibility to the legislature, with its corollary of effective votes of lack of confidence,—a system in which the reichstag will control the appointment of the incoming ministers as well as force the resignation of those with whom it is no longer in accord. It may therefore not be without a timely interest to review the German doctrine of the budget as a means of control over the executive.

No principle of constitutional law is more solidly established, or securely rooted in the general consensus of the English nation, than that which attributes to parliament, and particularly to the house of commons, a right to enforce its will upon the executive by means of its control over the finances. Budget-control has always been in England a chief sanction of ministerial responsibility. Since the parliaments of the seventeenth century wrested concession after concession from the Stuart kings by withholding supplies, there has been no question as to the financial proposals affording a most potent

instrument for enforcing the responsibility of ministers to parliament, and for insuring parliamentary domination in the government. Nor has the use of this agency of control ever been viewed as unjustifiable or beyond the competence of parliament. That an entirely different doctrine has grown up in Germany, in spite of the fact that the imperial and state constitutions expressly confer upon the legislative bodies the right to pass upon the budget, may not be surprising in view of the autocratic character of its governments; the nature of this constitutional theory is, however, probably unfamiliar to most students who have not made a special study of German constitutional law. In its subtle and refined distinctions it illustrates very well the general character of German jurisprudence.

Budget-control operates as a sanction of ministerial responsibility in two ways. The first is the refusal, or threatened refusal, of the legislature to vote the budget, or, in the era before a comprehensive, all-embracing budget has been developed, to vote the taxes and appropriations which are necessary for the maintenance of government. This power to dead-lock the wheels of government by refusing supplies is the primary and original form of budget-control. It is the ultimate financial sanction of ministerial responsibility. The second form of budget-control is normally a development of the first. It comes into play only after the evolution of the budget in its technical completeness, and ordinarily only when responsibility to the legislature is a thoroughly established and well-recognized principle. It consists of the criticism, the amendment, the rejection of single items, of new credits, or of new taxes by the legislature. In countries like England, France and Belgium, where ministerial responsibility is no longer a contested principle, it is only this second form of budget-control that is employed. It is never necessary actually to refuse to pass the budget; the knowledge that this power remains in reserve is always sufficient to compel ministers to give way before the determined opposition of a majority in the legislature. Like impeachment, budget-refusal has become practically obsolete; they both remain none the less important ultimate guarantees of ministerial responsibility.

In Germany the evolution has been different. Budget-refusal is not looked upon as a legitimate or constitutional instrumentality

of parliamentary control of the administration. Strangely enough, the second form of budget-control is exercised continually without the primary form, of which it is only a development, being recognized as permissible. The relation of the German doctrine of the budget to the belated evolution of constitutional government in the Teutonic empire,—to the delay in the development of a modern system of ministerial responsibility,—is both that of cause and effect.

The provisions with regard to taxation and appropriations in the German constitutions have been partly determined by the traditions of the period of the "estates state," partly copied from the French and Belgian models. The law of the southern and middle German states, which adopted constitutions early, recognized at first merely a "*steuerbewilligungsrecht*." An absolute control over all income was not given, since the medieval theory was adhered to that the grants of the "estates" were merely to supplement the ordinary revenues of the prince which required no legislative sanction. As in the "estates state," a committee of the landtag was in some cases associated in the administration of the treasury. In all the constitutions it is required that a periodical budget be laid before the estates. In the constitutions of the year 1848 or later, Belgian and French models were followed, and the principle of complete parliamentary control more definitely enunciated. The Prussian constitution of 1850 declares (article 99): "All income and expenditure must be estimated for each year in advance, and be included in the state's budget. This is annually adopted by a statute." Another article (article 100) provides that "Taxes and requisitions for the state's treasury may only be raised so far as they are included in the state's budget or provided for by special statutes." The imperial constitution (article 69) contains a similar provision: "All income and expenditure of the empire must be estimated for every year and included in the imperial budget. This is annually adopted before the beginning of the budget-year by statute."

If in Germany the "estates state" theory of the budget has largely influenced the modern conception of that institution,¹ ideas derived

¹ Thus Adolf Wagner (*Finanzwissenschaft*, 3te Aufl., 1883, p. 70) characterizes the government in the proceedings in connection with the budget as "*Partei des Angebotes*" and the parliament as "*Partei der Nachfrage*."

from the period of monarchical absolutism have also had a very important effect upon its development. In spite of the broad guarantees contained in the Prussian and the imperial constitutions, parliamentary control over the finances is very far from complete. In this, as in some other respects, Germany appears to have adopted the democratic institutions of her western neighbors before she was quite prepared, and the result is a somewhat lengthy period of adjustment in which the actual practice of the government does not conform strictly to the norms of the constitution, but displays many features which hark back to previous epochs.

As a sanction for ministerial responsibility, parliamentary control of the budget broke down completely in Prussia in the years 1862-1866. The history of the so-called "Conflict" is familiar. The necessity of in some way harmonizing the Prussian government's conduct in this period with the plain prescriptions of the constitution was the original occasion for the elaboration of a theory of the budget, which, in its ingenuity and subtlety, is thoroughly characteristic of German scholarship, but which will not generally appeal to the more practical minds of English and American students. Rudolf von Gneist is the originator of this constructive interpretation of budget-law. His views have been followed in the main by most German writers including Laband, Jellinek, Rehm and Seidler, and there can be no doubt that they express the official position. Few questions in the entire field of German constitutional law have been the subjects of so wide a discussion or so considerable a literature.²

The foundation of this theory is laid in two distinctions which in

² Among the most important discussions on this subject are the following: Seidler, *Budget und Budgetrecht*; Fricker, *Die Natur der Steuerverwilligung und des Finanzgesetzes*, in *Zeitschrift für Staatswissenschaft*, xvii, 636-702; Fricker, *Gesetz und Budget*, in *Zeitsch. für Staatsw.*, vol. 1, pp. 381-409; Conrad, *Hanwörterbuch der Staatswissenschaft*, articles "Budget" and "Budgetrecht;" Gneist, *Gesetz und Budget*; Gneist, *Budget und Gesetz*; Rehm, *Allgemeine Staatslehre*, pp. 266-306; Lasker, *Beiträge zur Verfassungsgeschichte Preussens*, ch. vii, sec. 5; Bluntschli, *Staatsrecht*, Book ii, ch. x; Jellinek, *Gesetz und Verordnung*, pp. 130-180, 276-312; Laband, *Zur Lehre vom Budgetrecht* in *Archiv für öffent. Recht*, vol. i, pp. 172-196; Arndt, *Budget, Gesetz und Verordnung*, in *Annalen des deutschen Reichs*, 1891, pp. 225-234; Redlich, *Recht und Technik der modernen Parlamentarismus*, pp. 721-730; Esmein, *Droit Constitutionnel*, 4ième ed., pp. 835-836, and Lebon, *Staatsrecht der französischen Republik*, pp. 160-161.

Germany are generally recognized as very fundamental. The first of these is between law and ordinance; the second between material and formal governmental acts, whether laws or ordinances. Thus a fourfold classification of acts of government results, viz. material laws, formal laws, material ordinances and formal ordinances. The qualifying adjective "material" refers to the content of the measure, describes its real essential character. The adjective "formal" describes the outward and external form which it bears. A material law is an act of government which embodies some general norm or rule of conduct; a material ordinance is one which applies a general rule in particular cases, or provides the machinery for the application of the general norm. The formulation of material laws is legislation, that of material ordinances is administration. Were the doctrine of the separation of powers adhered to strictly in practice, all material laws would be enacted in the form of statutes, while all material ordinances would be issued as acts of the executive. This is not the case, however. Many broad and general rules of conduct,—material laws, in other words,—emanate from the administration and bear the outward form of ordinances; while many statutes, i. e., formal laws, contain specific applications of general norms and are materially only ordinances. Let us illustrate this from the governmental acts of the United States. The establishment of the principle requiring competitive examinations for the civil service, particularly for the consular and diplomatic services, has been effected chiefly by executive action, yet that principle is essentially a broad and general rule of law. It is legislative not administrative in character. Materially it is a law, formally it is principally contained in ordinances. The conferring of a pension upon an individual, on the other hand, is materially an administrative act, an ordinance, although formally it may be embodied in a statute.

The connection of these rather subtle and artificial distinctions with the sanction of budget-control lies in the fact that most German writers regard the budget as only formally a law; materially, they insist, it is an ordinance.³ It embodies no general norm or rule of

³ An incident occurred in Italy in 1893 which indicates that there the same distinctions are recognized as in Germany, and that the budget is considered strictly an administrative act, not a law. On May 19, 1893, the chamber of deputies re-

conduct, no broad principle of action. It is merely the government's financial estimates and proposals for the ensuing fiscal period. It contains masses of figures concerning the details of expenditure and sources of revenue. It does not require promulgation and publication as do material laws. It is administrative in character. It provides the wherewithal for carrying on the government. The constitutions of most modern states require that it shall be enacted in the form of a statute; this certainly makes it formally a law, but cannot change its content or material character which is that of an ordinance.

The significance of these distinctions is seen when it is understood that the German school assert that a merely formal law cannot repeal or nullify an act which is both materially and formally a law. The latter embodies a general norm or broad rule of action. Its repeal or nullification amounts to the establishment of another norm or rule in its place. If congress has enacted that all railroads doing an interstate business shall be subjected to control and regulation by the interstate commerce commission, it establishes thereby a broad rule or norm for future action. The repeal or nullification of such a law is tantamount to the establishment of the opposite principle. If it be conceded that the budget by omitting to appropriate for the interstate commerce commission thereby nullifies the previous law it is itself a material law because it establishes by that repeal the opposite rule. But we have seen that the budget is not a material law, hence the conclusion is forced upon us that the budget cannot repeal or nullify material laws. By its very definition, as materially an ordinance, the budget is incapable of annulling material laws.

The refusal of the legislature to vote the budget does not, it is maintained, put an end to previous laws which depend for their execution upon financial support. These previous laws are the result of a consensus of the different organs of government to which the legislative power has been confided,—usually the two chambers and

jected the budget. This would have apparently involved the most serious consequences since the constitution (article 56) forbids the reintroduction of projects of law which have been defeated during the same session. It was observed, however, that this did not apply to the budget, which was strictly an administrative act, and accordingly it was again submitted to the chamber. Cf. Esmein, *Droit Constitutionnel*, 4 ième ed., p. 835, note.

the head of the state. A refusal of a single organ, the lower chamber, to assent to the budget cannot effect a repeal of these established laws. Only the same consensus of all the organs which possess a share of the legislative power is effectual to annul a law. It is a well-established principle that a law can only be repealed by the authority by which it was enacted. Enacted by the two chambers and the head of the state, it cannot be repealed or nullified by a single chamber through its refusal of the necessary credits.⁴

The passing of the budget, containing the necessary credits for the execution of the laws and the maintenance of the government, is a duty of the legislature which it must not fail to perform. It is permitted to criticise, propose amendments, object to single items, or refuse new credits or taxes; but to refuse to pass the budget entirely, or to leave any single branch of the government unprovided for, is, in Gneist's words, an "*actus inanis*." The modern legislature is not the medieval "estates" to whom the king is compelled to come petitioning for an aid. It is itself one of the coördinate organs of government endowed with duties as well as rights. One of its most important functions is to procure the money necessary for the maintenance of every branch of the government. If it fails in this duty it is derelict; if it neglects to perform this function it is culpable. It may not use the power which it possesses over the budget to wrest concessions from the administration or to enhance its own position in the state. Budget-control, it is asserted, is not a sanction for ministerial responsibility, except in the limited secondary sense that criticism and rejection of governmental proposals for new taxes and new credits make it such. Innovations it may legitimately oppose; it cannot wrest the budget from its real purpose of affording the gov-

⁴ The question whether an ordinary law may be repealed by omitting to provide for it in the budget arose in France in 1885, when the chamber of deputies failed to provide in the budget for the maintenance of the Catholic Theological Faculties which had been established by the law of 1806 and the decree of 1808 founding the University. The senate objected to this omission on the grounds above discussed, but eventually accepted the budget. The discussion at this time left it generally clear that the law upon which the Faculties rested was not repealed by withholding of financial support, and that it only required a future inclusion in the budget to make it again thoroughly effective. The practical effect, however, was to annul the old law for the time being. Cf. Lebon, *Staatsrecht*, pp. 160-161.

ernment a well-ordered scheme of finance for the ensuing fiscal period to serve as a lever to compel the ministry to resign. Gneist says:⁵ "Eine Verweigerung des Budgets in Bausch und Bogen wird also 'unconstitutionell' und rechtlich unwirksam anerkannt." Jellinek⁶ maintains the same view: "Die Ablehnung des Budgets, die Streichung gesetzlich fixirter Ausgaben, die Nichtanerkennung der zur Deckung derselben notwendigen Summen ist kein legales Mittel zur Erreichung politischer Zwecke, keine gesetzliche Waffe, um ein Ministerium zu stürzen, auch keine von der Rechtsordnung erlaubte Form, in der ein Misstrauensvotum geäußert werden darf."

What, it may be asked, happens when the legislature nevertheless does refuse to vote the budget? Upon this question a difference of opinion exists. Laband attempts to bridge the hiatus which such an eventuality produces by juristic deduction. He maintains that constitutional law is a complete whole and can have no voids or vacuums. What is not provided by statutory prescription must be filled by juristic construction. There must be a legal solution for every constitutional difficulty. In this case the constitution requires the passage of the budget. If it is not passed, laws already in existence are in no wise repealed, and the income and expenditure which they entail do not lapse but continue as before. The government is responsible for the due execution of all existing laws, and its collection of taxes and appropriation of revenues to these ends are perfectly legal. It must be careful not to overstep the actual needs which these laws occasion. No new taxes or credits are permissible. But within the limits of existing law the measures which it finds necessary are entirely legal.

Jellinek does not accept the theory of the completeness of constitutional law. He maintains that situations may arise when a status of fact supervenes upon a status of law, and that it is folly to try to find legal principles upon which they can be resolved. A budget, he considers, only a financial plan; one cannot speak of an administration without a budget; every government must have a budget. When the legislature has refused to approve it, the budget is simply executed unconstitutionally. For conflicts such as that in Prussia in

⁵ *Gesetz und Budget*, pp. 106, 107.

⁶ *Gesetz und Verordnung*, p. 289.

1862-1866, there is no legal but only a historico-political solution. The justification of the acts of government, in such circumstances, does not arise from their legality but from their necessity. The constitution presumes a harmonious coöperation of the executive and legislative branches in the passage of the budget; when this does not exist, whatever the cause, a status of fact occurs. The government must be carried on; the life of the state cannot be interrupted. Consequently such conflicts become questions of supremacy, "*Macht-fragen*." The party possessing the predominant power imposes its will upon the other. Only retrospectively, by an act of indemnification, can such proceedings be legalized.

Some of the continental constitutions make a partial provision for the eventuality of the budget not being voted. The Prussian constitution provides (article 109) that "The existing taxes and duties shall continue to be raised. . . . until they are altered by law." This clearly permits the collection of the taxes, but there is no constitutional warrant for the spending of the money thus obtained except as provided in the budget. This same provision is found in the Austrian constitution. In some other states (Saxony, Oldenburg) it is provided that in case of a conflict which threatens the passage of the budget, the questions at issue shall be submitted to a superior court. The Swedish constitution provides (section 109) that if the riksdag has neglected to vote the budget the taxes and appropriations of the previous financial period shall continue in force. This provision has found great favor among German writers.

The prevailing view in Germany, it is evident, limits budget-control as a sanction of ministerial responsibility to the second or milder mode of its application. It is denied that refusal to vote the financial law ever constitutes a legitimate method of bringing a recalcitrant ministry to terms. But it must be evident that if the ultimate sanction of refusal to pass the budget is not permitted the developed secondary sanction of criticism and amendment will be of little use. If the ministry and the legislature are both aware that a refusal of the budget in a form acceptable to the ministry is quite out of the question (and if it does occur, the ministry are justified in collecting taxes and making expenditures without legislative grant), what weight or force will legislative criticisms or proposals carry?

The value of the second form of budget-control as a sanction depends upon the recognition of the predominance of the legislature and of the responsibility of the ministers to it. To this point in the evolution of constitutional government Germany has not yet attained.

It is entirely beside the mark when German writers assert that in Great Britain the refusal to vote the budget is altogether unknown.⁷ It is true that "now the weapon lies rusty in the armory of constitutional warfare."⁸ In 1781 a proposal to delay supply for a few days in order to extort from Lord North a pledge regarding the war in America brought forth the admission that since the Revolution of 1688 no such proposal had been made. Again in the same session Lord Rockingham proposed to postpone supply until explanations of the causes of Admiral Kempenfeldt's retreat had been given. In neither case, however, did the commons feel that the welfare of the state ought to be hazarded, and the credits were accordingly voted. In 1784 it was feared for some time that the house of commons, under Fox's leadership, would actually refuse to pass the annual appropriation bill, and it was in fact delayed for a time, but as May says, "The precedent of 1784 is the solitary instance in which the commons have exercised their power of delaying supplies." In this case the budget was indeed finally passed, so Todd⁹ is right in the statement that "the undoubted right of the commons to withhold supplies from the crown has not been exercised in a single instance since 1688." But though fallen into disuse, refusal to pass the budget is still in Great Britain an ultimate sanction. Like impeachment, it is never resorted to because its work in making ministers responsible to parliament has been performed, and the ordinary control over their administration can much better be secured by milder agencies. In Germany, where ministerial responsibility has not yet become established, there is still need for the exercise of this ultimate sanction.

⁷ Thus Gneist (*Gesetz und Budget*, p. 117) says: "Das Resultat unserer Untersuchung ist, dass ein selbständiges Ausgabebewilligungsrecht welches man aus der Englischen Verfassung abgeleitet und als Eckstein aller Rechte der Volksvertretung bezeichnet hat, in England überhaupt nicht besteht."

⁸ May, *Constitutional History*, 1891 ed., pp. 72, 442, 443.

⁹ *Parliamentary Government*, Walpole ed., p. 125.

In France, as in Great Britain, the prevailing opinion is that refusal to vote the budget is a legitimate and proper sanction of ministerial responsibility. Lebon declares:¹⁰ "The right appertaining to the legislature of refusing the budget entirely or in part is beyond question, and, since the budget is an annual law which must first be accepted by the lower chamber, this body is in general, through the decision which it takes in this matter, mistress of the fate of the ministers." The same opinion is expressed by Esmein,¹¹ as follows: "Elle [the budget] n'a pas en effet pour but principal une saine et bonne économie; elle ne vise pas principalement à faire de l'État un bon père de famille, qui tous les ans établit ses recettes et ses dépenses pour l'année suivante. Elle est surtout la bride avec laquelle les Assemblées représentatives tiennent le pouvoir exécutif à leur discrétion, ou plutôt la défense efficace qu'elles ont contre ses empiétements possibles Sous le gouvernement parlementaire, la menace d'un refus du budget est la sanction naturelle et dernière de ses règles conventionnelles."

In Germany the contest between crown and legislature has not been fought out to a finish. The crown still holds a position of predominance. In the one great contest in which budget-control was invoked the physical force was not with the parliamentary party and the crown's ministers were not only able to carry on the government, but to secure in the end an interpretation of budget-law which would make it completely innocuous. The opposite interpretation was maintained by Lasker, the leader of the opposition to Bismarck in the Conflict of 1862-1866, with great vehemence and cogency; but the course of events was too strong in the other direction. If, as seems likely, Germany is on the threshold of another great contest for parliamentary domination, we may expect to see the subtle and somewhat fantastic theory of the budget, which has hitherto commended itself to the majority of German jurists, beaten into new shape more conformable to modern ideas of parliamentary government.

¹⁰ *Staatsrecht*, sec. 93.

¹¹ *Droit Constitutionnel*, 4 ième ed., pp. 835, 836, 841. Cf. also pp. 143, 144.